Received in E.R. 7/7/76

OGC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHANIE KIPPERMAN, etc.,

Plaintiff,

vs.

JOHN A. McCONE, et al.,

Defendants.

No. C-75-1211-CBR

STAT

REPLY BRIEF OF DEFENDANT J. EDWARD DAY

TO PLAINTIFF'S RESPONSE AND OPPOSITION

TO MOTIONS TO DISMISS

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IN THE UNITED STATES DISTRICT COURT

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STEPHANIE KIPPERMAN, etc., Plaintiff, vs. JOHN A. McCONE, et al., Defendants.	No. C-75-1211-CBR REPLY BRIEF OF DEFENDANT J. EDWARD DAY TO PLAINTIFF'S RESPONSE AND OPPOSITION TO MOTIONS TO DISMISS

This brief is submitted on behalf of J. Edward Day ("Day") in reply to Plaintiff's Response and Opposition to Defendants' Motions for Dismissal or for Summary Judgment ("Plaintiff's Latest Response"), dated June 21, 1976.

The single issue presented by Day's motion to dismiss is whether Plaintiff can maintain this action against Day in this Court. The briefs previously filed on behalf of Day in support of his motion set forth the reasons why this action should be dismissed as to Day for lack of personal jurisdiction and improper venue.[1]

1/ In support of Day's motion to dismiss, the following briefs have been filed: Brief in Support of the Motion of Defendant J. Edward Day to Dismiss the Amended Complaint, filed January 15, 1976; Reply

This Court expressed its agreement with the contentions that it lacks personal jurisdiction over the individual defendants, including Day, and that venue in the district is improper (Memorandum of Opinion, pp. 13-14, note 5). Nothing in the Government's Motion to Vacate affected any of the facts relevant to Day's motion to dismiss for lack of jurisdiction and improper venue. The facts remain exactly the same as when the Court issued its Memorandum of Opinion.

In her Latest Response, Plaintiff merely re-argues her position that 28 U.S.C. §1391(e) establishes that this Court has personal jurisdiction over Day and that there is proper venue in this Court. Plaintiff does not and cannot contest the clear facts showing there is no jurisdiction or venue over Day in this action, and she gives no reason why the issue of jurisdiction over Day should be reconsidered by the Court.

Since this §1391(e) issue has been extensively briefed and an opinion on it entered by this Court, we shall reply as briefly as possible while meeting the new matter raised by Plaintiff at this late date. While the filing of this argument may be an excess of caution, we hope that the issues of jurisdiction and venue over Day may finally be put to rest and that he can be dismissed from this case. This will leave the Plaintiff and the Government before this Court to litigate the probabilities and possibilities of Plaintiff's mail having been covered or intercepted.

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1 (cont.)/ Brief of Defendant J. Edward Day, filed February 4, 1976; Supplemental Brief of Defendant J. Edward Day in Support of His Motion to Dismiss, filed March 3, 1976 (this brief was necessitated by Plaintiff's filing of her Third Amended Complaint); and Brief in Support of Motion to Enter an Order of Dismissal for Lack of Jurisdiction over the Person, filed May 20, 1976.

Plaintiff argues that §1391(e) is an all-purpose statute that provides personal jurisdiction and venue and authorizes extra-territorial service with respect to Day, a private citizen. The clear language of §1391(e), made even clearer by its legislative history, simply does not apply to defendant Day.

On its face, §1391(e) applies only to "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority". All verbs in this section are in the present tense, and there is no reference to former federal officials or private citizens.

Analysis of the legislative history of §1391(e) confirms what is apparent on its face.[2] The Senate and House Reports are almost identical. The bill under consideration became the Act of October 5, 1962, Pub. L. No. 87-748, 76 Stat. 744; it consisted of two sections. Section 1 is now 28 U.S.C. §1361. It was inserted at the end of Chapter 85 of Title 28 of the United States Code, which is entitled "CHAPTER 85-DISTRICT COURTS; JURISDICTION". Section 2 of the Bill added subsection (e) to 28 U.S.C. §1391, which is found in "CHAPTER 87-DISTRICT COURTS; VENUE".

The Senate and House Reports described the purpose of Public Law No. 87-748 in almost identical words:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought

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2/ *S. Rep. No. 1992*, 87th Cong., 2nd Sess. (1962), as reprinted in *U.S. Code Cong. & Ad. News* (1962), pp. 2784-2787, and *H.R. Rep. No. 536*, 87th Cong., 1st Sess. (1962). [We shall hereafter refer to specific language in the Senate Report by simply designating the page in *U.S. Code Cong. & Ad. News* (1962).]

only in the U.S. District Court for the District of Columbia." (*H.R. Rep. No. 536* at 1; see also *S. Rep. No. 1992* at 2785)

Both reports state the effect of the legislation in almost identical language:

"This Bill will not give access to the Federal courts to an action which cannot now be brought against a Federal official in the U.S. District Court for the District of Columbia." (*S. Rep. No. 1992* at 2785; see also *H.R. Rep. No. 536* at 2)

Both reports explained that due to an historical accident, mandamus could be brought only in Washington, that this accident resulted in a heavy burden on the district court there, and that Public Law No. 87-748 was designed to remedy that situation.

The House Report clearly shows that §1361 and §1391(e) were passed as a common approach to solve a common problem and must be read together.

"Section 1 of this bill therefore amends chapter 85 of title 28 of the United States Code to provide specifically that all district courts shall have original jurisdiction over any action to compel an officer or employee of the United States or any agency thereof to perform his duty.

"Section 2 is the *venue* section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action *which is essentially against the United States* to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued. It is not intended to create governmental liability where it does not now exist. It is concerned only with the place where the action

may be brought." [Emphasis added] (*H.R. Rep. No. 536* at 2)

This plain and simple statement of legislative history has been found to be controlling on the courts in the interpretation of this 1962 legislation. See *Natural Resources Defense Council v. Tennessee Valley Authority*, 459 F.2d 255, 258 (2d Cir., 1972), *Rimar v. McCowan*, 374 F.Supp. 1179, 1181-1182 (E.D. Mich. 1974).

At several places in the House Report, it is stressed that the only actions covered by §1391(e) are those that are "in essence against the United States" (*H.R. Rep. No. 536* at 3 and 4). The same language appears in the Senate Report, *S. Rep. No. 1992* at 2786. It is also made clear that §1391(e) "is intended to facilitate review by the federal courts of administrative actions" (*S. Rep. No. 1992* at 2785). The House Report also states:

> *"In order to give effect to the broadened venue provision of this bill*, it is necessary to modify the service requirements under the Federal Rules of Civil Procedure insofar as they apply to actions made possible by this bill. Rule 4(f) restricts effective service to the territorial limits of a State in which the district court is held unless a statute specifically provides for it to go beyond the territorial limit of that State. *Since this bill is designed to make a Federal official or agency amenable to suit locally*, the bill provides that the delivery of the summons and complaint to the officer or agency may be made by certified mail outside of the territorial limits of the district in which the action is brought." [Emphasis added] (*H.R. Rep. No. 536* at 4)

There can be no doubt that Congress set out to and did limit the application of §1391(e) to Government officials and agencies in cases that are essentially against the Government to review

administrative actions. It does not apply to Day, who ceased being a federal official 13 years ago and is being sued in tort for damages.

Carney v. Laird, 326 F.Supp. 741 (D.R.I. 1971), *aff'd* 462 F.2d 606 (1st Cir. 1972), was a habeas corpus action dealing with a naval officer. The plaintiffs there had served the Secretary of Defense, the Secretary of the Navy and the Chief of Naval Operations, all federal officials. The plaintiffs attempted unsuccessfully to use §1391(e) to support a claim of jurisdiction over these defendants. The District Court in Rhode Island wrote [326 F.Supp. 741 at 744]:

> "That provision [§1391(e)] relates only to proper *venue* and was not intended by Congress to broaden the availability of habeas corpus relief and I read it not to have done so."

So, too, Congress took no action to broaden the availability of tort relief against private citizens who are being sued personally for money damages.[3]

Plaintiff's argument that §1391(e) applies to private citizens who formerly were federal employees, as best we can follow it, appears to be that the phrase "under color of legal authority" has reference to suits against present federal officials "individually" (p. 14) and that this must be expanded to former officials else the objective of §1391(e) would be totally frustrated (p. 16).

Again, plaintiff conveniently ignores the clear legislative history of §1391(e), including the portion quoted exten-

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3/ Whether or not §1391(e) applies to a damage suit against present Government officials is irrelevant with respect to Day, although we believe the better view is that the section does not encompass money damages.

sively at p. 14 of Plaintiff's Latest Response. The House Report states that the words "acting under color of legal authority" were intended to include those cases where the action is *"nominally"* brought against the federal officer in his individual capacity and "not as a private citizen".

> "Such actions are also in essence against the United States but are brought against the officer or employee as individuals only to circumvent what remains of the doctrine of sovereign immunity."
> (*H.R. Rep. No. 536* at 4, Plaintiff's Latest Response, p. 14)

The venue provision of §1391(e) therefore was designed to apply "where the action is based upon the *fiction* that the officer is acting as an individual" (*Ibid*, emphasis added).

Plaintiff's action against Day is not against him "nominally" and is not "in essence against the United States". Nor is Day named as a defendant "to circumvent what remains of the doctrine of sovereign immunity". Plaintiff's action against Day is against him *personally*, sounds in tort and seeks money damages. Section 1391(e) - deliberately placed by Congress in the venue chapter of title 28, and specifically limited by its language and legislative intent to federal officials and agencies in actions that are essentially against the United States and that previously could only have been brought in the United States District Court for the District of Columbia - does not confer jurisdiction or venue over Day.

Like any other private citizen, Day is subject to suit where he resides or where he has sufficient minimum contacts to satisfy due process requirements. The fact that he was once a federal employee years ago, in and of itself, does not make him subject to the personal jurisdiction of every federal district court in the 50 states. Section 1391(e) may

well have been designed to "remove the virtually impenetrable barrier of procedural entanglement which has so frequently provided the government with de facto immunity from lawsuits" (Plaintiff's Latest Response, p. 17). But that barrier had nothing to do with personal damage claims against private citizens, and it has been removed with respect to the Government. Congress certainly did not intend in §1391(e) to strip from this defendant his due process rights under the Fifth Amendment. Even where Congress has purposefully set out to create private rights and encourage private plaintiffs to engage in litigation to carry out the purposes of certain statutes, it has still limited venue to where the *defendant* is an inhabitant or where it can be found or transacts business, *e.g.*, 15 U.S.C. §78aa (Securities Acts) and 15 U.S.C. §22 (Anti-trust Acts). These acts did not make the residence of the *plaintiff* the basis of jurisdiction. Thus, there is indication of Congressional intent not to violate the minimum contact requirement of due process. Plaintiff's suggestion that Congress did just that with regard to former federal officials by implication in §1391(e), without a word or a thought, is totally devoid of merit.

The only case to the contrary is *Lowenstein v. Rooney*, 401 F.Supp. 952 (S.D.N.Y. 1975). It must be disregarded. First, that case is distinguished from the instant action in that there the plaintiff had alleged tortious acts in the forum state, New York, and this allegation alone provided personal jurisdiction. Second, that opinion is simply wrong in ignoring the clear language of §1391(e) and its legislative history. Third, the court failed to consider and follow the clear mandate of its own Circuit Court as set forth in *Natural Resources Defense Council v. Tennessee Valley Authority, supra.* There, the Second Circuit stated [459 F.2d 255, 259]:

"No one has suggested any tenable reason why Congress would have wished to subject this essentially

local federal agency to a suit like this, relating to the compliance of its operations in the Tennessee Valley with federal law, in any federal district, from Maine to Hawaii or from Alaska to Florida, which is the residence of an organization claiming the right to sue under today's liberalized notions of standing. When the statute is read in its full context, with realization of its purpose, and in light of its legislative history, it is plain that Congress did not so direct."

Similarly, there can be found no tenable reason to suggest that Congress directed that a private citizen who once worked for the Government could be sued in tort for money damages in any federal district from Maine to Hawaii or from Alaska to Florida which might be the residence of a plaintiff claiming the right to sue. See *Wu v. Keeney*, 384 F.Supp. 1161, 1168 (D.D.C. 1974).

Plaintiff also argues that personal jurisdiction is shown by the provision of §1391(e) for extraterritorial service (Plaintiff's Latest Response, pp. 11-12). She cites no authority supporting this proposition. While she cites the House Report and quotes from it at page 11, the quoted language speaks only of venue and makes no mention of jurisdiction. Similarly, the quote from Professor Moore on page 11 speaks only of venue and makes no mention of jurisdiction.

The mere fact that someone is served outside a court's territorial limits does not give the court jurisdiction over the person served.

"[A]lthough Rule 4 fixes the manner and scope of service, it does not say when the person served is subject to the jurisdiction of the court that served him. Similarly, although Rule 4(f) provides for out-of-state service on certain defendants, such service will

not be valid unless they have enough contacts with the state of service to be subject to suit there." *Coleman v. American Export Isbrandtsen Lines, Inc.*, 405 F.2d 250, 253 (2d Cir. 1968).

While personal jurisdiction cannot be obtained without proper service, the mere following of the mechanics of service does not automatically provide personal jurisdiction. The due process requirement of minimum contacts must be met. In accord, the Court of Appeals for this circuit has ruled that §1391(e) does not extend the federal courts' jurisdiction over a local federal agency located outside its territorial jurisdiction. See *Powers v. Mitchell*, 463 F.2d 212, 213 (9th Cir. 1972), *cert. den.* 409 U.S. 967 (1972).

In his prior memoranda Day has already pointed out the unconscionable burden that would be imposed on the status of federal employment if ex-federal employees were subject to suit in every district court in the nation (Brief in Support of the Motion of J. Edward Day to Dismiss the Amended Complaint, p. 10). Under Plaintiff's interpretation of §1391(e), former officials such as Secretaries of Commerce and E.P.A. Administrators could be sued with respect to actions taken by their agencies, for which they were *nominally* responsible, in every and any district where a resident claimed damages. If Congress intended to saddle government employment with such consequences, which intent would raise serious due process questions, it is reasonable to assume Congress would have given the matter some consideration. There would be specific legislative history as to such a controversial proposal. Congress intended no such consquences. Former federal officials, like all other United States citizens, are subject to suit and answerable for their actions only according to the "traditional notions of fair play and substantial justice" set

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forth in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945).

This action against Day was originally filed in June, 1975, over one year ago. Plaintiff has filed no less than four complaints, attempting on each occasion to set forth a complaint against Day enforceable in this Court. She has briefed the issue of personal jurisdiction three times. In her Latest Response, Plaintiff confirms the futility of her position by suggesting - after a year of litigation - that Defendant Day be required to set forth the basis for personal jurisdiction over himself and to suggest the proper forum for this action. It is axiomatic that Plaintiff bears the burden of pleading and proving that this Court has jurisdiction over Day. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *L.D. Keeder Contractors of Arizona v. Higgins Industries*, 265 F.2d 768, 770 (9th Cir. 1959); *Socialist Workers Party v. Attorney General of the U.S.*, 375 F.Supp. 318, 332 (S.D.N.Y. 1974).

The only venue provision that applies to Day is 28 U.S.C. §1391(b), which provides venue where all the defendants reside or the cause of action arose. Neither possible set of facts exists to confer venue in this case in the Northern District of California.[4] Equally plaintiff has failed to demonstrate personal jurisdiction over Day pursuant to Rule 4(f), Federal Rules of Civil Procedure[5], under the California long-arm statute. [*California Code of Civil Procedure* §410.10]

Plaintiff possibly has her remedy in this district against the Government and certainly has her remedy here under the Freedom of Information Act court review. In any event, since

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4/ See pp. 4-9 of Defendant J. Edward Day's January 15, 1976 brief in support of motion to dismiss the amended complaint.

5/ See pp. 10-14 of Day's January 15, 1976 brief.

no statute of limitations has run during the pendency of this litigation that would preclude Plaintiff from commencing a separate action in a proper forum, transfer of this action to some other unnamed District Court is wholly unwarranted, even by the case law cited in Plaintiff's Latest Response, *i.e.*, *Goldlawr v. Heiman*, 369 U.S. 463 (1962); and *Taylor v. Love*, 415 F.2d 1118 (6th Cir. 1969).[6]

CONCLUSION

After a year of litigation involving four complaints, the submission of several briefs and numerous hearings, the time has come to dismiss this action against Day for the reasons stated above and in his prior memoranda. There are no facts - and Plaintiff has pointed to none - to support the continuance of this action against Day any longer.

Respectfully submitted,

Richard Ernst
Counsel for Defendant
J. Edward Day

Donald J. Cohn
James V. Kearney
Webster & Sheffield
Of Counsel

Dated: July 2, 1976

6/ 28 U.S.C. §1406(a), which authorizes the District Court to transfer an action in which venue has been laid improperly, expressly states that the District Court shall dismiss a case laying venue in the wrong division or district unless it is in the "interest of justice" to transfer such a case. In the instant action the "interest of justice" requirement for the transfer of a case to a district in which it could have been brought has not been asserted by Plaintiff, let alone met.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
City & County of San Francisco)

Kim Lacey, being first duly sworn, deposes and says:

That I am a citizen of the United States, over the age of 18 and not a party to or interested in the within entitled cause; that my business address is 635 Sacramento Street, San Francisco, California.

That I served by mail the following document:

REPLY BRIEF OF DEFENDANT J. EDWARD DAY TO PLAINTIFF'S RESPONSE AND OPPOSITION TO MOTIONS TO DISMISS

in the following manner:

I enclosed a true copy of said document in an envelope addressed as follows:

[See attached Exhibit A]

I sealed said envelope and deposited it so sealed and addressed on the 2nd day of July, 1976, with the postage thereon fully prepaid, in a United States post office mail box in the City and County of San Francisco, California.

Kim Lacey

Subscribed and sworn to before me

This 2nd day of July, 1976.

Joan Fowler
Notary Public, in and for the State of California, with principal office in the City & County of San Francisco.

My commission expires

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